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Tompo bin Yara v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(M)-306–11 OF 2015
DAVID WONG, PRASAD ABRAHAM AND MARY LIM JJCA
13 FEBRUARY 2017

C

Criminal Law — Murder — Defence of grave and sudden provocation — Whether the defence was established on balance of probabilities entitling accused to reduced charge of culpable homicide not amounting to murder under s 304(a) of the Penal Code

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The High Court sentenced the appellant to death for murdering his wife ('the deceased') and to six months' jail for attempting to commit suicide after the murder. The offences were committed in a room the appellant and his wife shared in a house provided for workers in an oil palm plantation in Miri, Sarawak. Two other workers occupied another room whilst the deceased's two brothers, Agus and Damin, stayed in the living room of the house. In the wee hours one morning, Agus was woken up from his sleep by the deceased's scream for help from her room. Agus knocked on the door of the room several times but there was no response. When he saw blood seeping out from under the door, he alerted the plantation management who called the police. Police broke into the room and found the deceased dead but the appellant still alive. The deceased had multiple stab wounds on her body. The appellant had stabbed himself in the abdomen and had also slit his throat necessitating emergency surgery and a two week stay in hospital. Due to his condition and his inability to speak, police were only able to record a cautioned statement from him 18 days later. The prosecution's evidence against the appellant at his trial was wholly circumstantial. The appellant did not dispute the charges but argued that the prosecution's evidence and his cautioned statement had established the defence of grave and sudden provocation which entitled him to have the murder charge reduced to culpable homicide not amounting to murder under s 304(a) of the Penal Code. Both in his cautioned statement and at trial, the appellant maintained that he was asleep alone in his room when the deceased woke him up and then told him she was no longer in love with him and that she was involved with another man named Suprel who worked in a nearby plantation. The appellant said he requested the deceased not to leave him as they had a ten year old son and her action would bring shame to their family. The appellant said when the deceased did not heed his advice but instead went on to say Suprel was much younger, and was better in sexual performance, than him and that he should not 'disturb' Suprel, the appellant had become so enraged he took a knife ('*badek*') he usually kept under his pillow and attacked

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her with it. The appellant said he could not recollect what happened after he started attacking the deceased but after he found that she was dead he stabbed himself in the abdomen twice and then slit his throat. The trial judge (i) rejected the cautioned statement because it was made several days after the incident thus allowing the appellant opportunity to plan his defence; (ii) refused to believe any conversation between the appellant and the deceased took place before she was attacked because none of the other occupants in the house heard it; (iii) refused to believe Suprel was real and that he was a character the appellant had concocted; (iv) believed the appellant planned the murder by keeping the knife under the pillow and not because it was a Bugis tradition to keep a *badek* under the pillow to ward off evil spirits; (v) believed the appellant was increasingly suspicious, jealous and angry because the deceased had been receiving many calls on her cellphone from a stranger and had frequently been out to watch movies till late. The trial judge was of the view the appellant was fully aware of what he was doing at the material time because he had the time to 'make sure' his wife was dead before deciding to commit suicide.

Held, allowing the appeal, setting aside the High Court's decision, convicting the appellant on a lesser charge of culpable homicide not amounting to murder and sentencing him to 18 years' jail in respect of same:

(1) On the evidence of the prosecution's witnesses and the appellant's cautioned statement, the defence of grave and sudden provocation, which entitled the appellant to a reduced charge under s 304(a) of the Penal Code, was established on a balance of probabilities (see para 53).

(2) Contrary to the findings of the trial judge, the evidence showed that the deceased's provocative words uttered in the conversation in the early hours of 16 January 2014 actually caused in the appellant, as it might have caused in any reasonable man of the appellant's race, religion, class and background, a sudden and temporary loss of self-control, the result of which the appellant killed the deceased. This court was satisfied with the appellant's claim that he was not aware or suspicious of the deceased's affair with Suprel since any prior knowledge he might have had of any extra-marital affair was already resolved in December 2013. Any other 'theory' remained speculative and this was what, at best, could be ascribed to the trial judge's conclusions at paras 46–53 of his judgment. None of those conclusions was based on evidence before the court or could be traced back to examination of some witness. None of the theories were put to the appellant or to any of the witnesses called and it was wholly unsafe to convict the accused as charged under such circumstances (see paras 52–54).

(3) There was no basis for the trial judge to conclude that the appellant's cautioned statement was incapable of being corroborative evidence because it was not contemporaneous with the murder but recorded 18

days later thus giving him time to ponder on what to say to the police. The delay in giving the cautioned statement was more than adequately explained by the defence but the trial judge failed to give it any regard. This failure was detrimental to the prosecution's case and seriously prejudiced the appellant, rendering the conviction unsafe and liable to be set aside. Because the appellant had slit his throat he could not speak clearly and was in no position to give his cautioned statement earlier than when he did. Consequently, the cautioned statement was capable of being corroborative evidence on the facts of the case. The defence proffered in the cautioned statement and that which was proffered at trial by the appellant remained consistently the same (see paras 32 & 34–36).

(4) The trial judge gave unnecessary and unreasonable emphasis on having the alleged conversation between the appellant and the deceased heard by the other occupants of the house before he would consider its existence credible. At no time did the appellant say the conversation was loud or that there was shouting or raised voices. Both in his cautioned statement and during his testimony, the appellant said the deceased spoke normally and slowly. The trial judge materially overlooked the fact that Agus was only awakened by the deceased's scream and, even then, it only awoke Agus and not Damin, although the latter was also sleeping in the same living room. With the consistency of evidence, although it was only from the accused himself, this court was inclined to conclude that there was, indeed, such a conversation between the appellant and the deceased (see paras 39 & 42).

(5) Based on the evidence, it was erroneous for the trial judge to conclude that Suprel did not exist and that there was no affair between him and the deceased. It was inconsistent for the trial judge to conclude that there was no such third person when the prosecution's case itself referred to the existence of a third person, a man, who had regularly been calling the deceased. Even the investigating officer, PW12, agreed that Suprel could have been an illegal worker who did not want to be found, especially with the turn of events and the death of the deceased (see paras 43–44 & 46).

[Bahasa Malaysia summary

Mahkamah Tinggi menjatuhkan hukuman mati terhadap perayu kerana membunuh isterinya ('si mati') dan kerana cuba membunuh diri selepas pembunuhan tersebut. Kedua-dua kesalahan dilakukan di dalam bilik yang dikongsi oleh perayu dan isterinya di dalam sebuah bilik yang disediakan untuk pekerja-pekerja ladang minyak kelapa sawit di Miri, Sarawak. Dua lagi pekerja menghuni sebuah bilik manakala dua orang saudara lelaki si mati, Agus dan Damin, tinggal di ruang tamu rumah. Pada satu pagi, Agus dikejutkan daripada tidur oleh jeritan si mati meminta tolong dari bilik tidurnya. Agus mengetuk pintu bilik tersebut beberapa kali tetapi tiada respons. Apabila nampak darah mengalir keluar dari bawah pintu, Agus memaklumkan ini

kepada pihak pengurusan ladang yang kemudian menelefon pihak polis. Pihak polis memecah masuk bilik tersebut dan menjumpai si mati yang telah meninggal dunia dan perayu yang masih hidup. Terdapat beberapa luka tikaman pada badan si mati. Perayu menikam dirinya di bahagian abdomen dan mengelar lehernya dan memerlukan pembedahan surgeri dan diwadkan selama dua minggu di hospital. Akibat keadaan dan kesukarannya berbicara, pihak polis hanya boleh merekodkan pernyataan beramaran daripadanya 18 hari kemudian. Keterangan pihak pendakwaan terhadap perayu semasa perbicaraannya bersifat ikut keadaan sepenuhnya. Perayu tidak mempertikaikan kedua-dua pertuduhan tetapi menghujahkan keterangan pihak pendakwaan dan pernyataan beramaran perayu membuktikan pembelaan provokasi serius dan serta merta yang membolehkan pertuduhan pembunuhan dikurangkan kepada homisid yang tidak terjumlah kepada pembunuhan bawah s 304(a) Kanun Keseksaan. Dalam pernyataan beramarannya dan semasa perbicaraan, perayu menyatakan dia tidur berseorang di dalam bilik semasa si mati mengejutkannya dan memberitahunya dia tidak lagi cintakan perayu kerana dia terlibat dengan seorang lelaki bernama Suprel yang bekerja di ladang berdekatan. Perayu meminta agar si mati tidak meninggalkannya kerana mereka mempunyai anak lelaki berumur sepuluh tahun dan tindakannya akan memalukan keluarga mereka. Perayu mengatakan ketika si mati tidak mengambil peduli nasihatnya dan sebaliknya mengatakan Suprel lebih muda dan lebih baik di ranjang berbanding perayu dan perayu tidak patut mengganggu Suprel, perayu naik berang hinggakan dia mengambil pisau ('badek') yang disimpan bawah bantal dan menyerang si mati. Menurut perayu, dia tidak ingat apa yang terjadi selepas dia menyerang si mati tetapi selepas menyedari si mati telah meninggal dunia, perayu menikam dirinya sendiri di bahagian abdomen sebanyak dua kali dan mengelar lehernya. Hakim bicara (i) menolak pernyataan beramaran kerana ini dibuat beberapa hari selepas insiden lantas memberi perayu peluang untuk merancang pembelaannya; (ii) enggan mempercayai percakapan antara perayu dengan si mati berlaku sebelum dia diserang kerana penghuni-penghuni lain di dalam rumah tidak mendengarnya; (iii) enggan percaya Suprel wujud dan bahawa dia watak yang direka oleh perayu; (iv) percaya bahawa perayu telah merancang pembunuhan dengan menyimpan pisau tersebut di bawah bantal dan bukan kerana menjadi tradisi bugis untuk menyimpan 'badek' di bawah bantal untuk menghalau semangat-semangat jahat; (v) mempercayai perayu bertambah syak, cemburu dan marah apabila si mati menerima panggilan telefon daripada telefon bimbitnya dan sering keluar hingga lewat malam untuk menonton filem. Hakim bicara berpendapat perayu sedar apa yang dilakukannya pada masa material kerana dia mempunyai masa untuk memastikan isterinya telah mati sebelum memutuskan untuk membunuh diri.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, mensabitkan perayu atas pertuduhan yang dikurangkan iaitu homisid

yang tidak terjumlah kepada pembunuhan dan menjatuhkan hukuman 18 tahun penjara atasnya:

(1) Berdasarkan keterangan pihak pendakwaan dan pernyataan beramaran perayu, pembelaan provokasi serius dan serta merta, yang melayakkan perayu mendapat pengurangan pertuduhan bahawa s 304(a) Kanun Keseksaan, dibuktikan atas imbangan kebarangkalian (lihat perenggan 53).

(2) Bertentangan dengan dapatan hakim bicara, keterangan menunjukkan perkataan-perkataan si mati yang membangkitkan provokasi dalam percakapan pada awal waktu pagi 16 Januari 2014, menyebabkan perayu, seperti mana seorang lelaki munasabah yang datang dari bangsa, agama, kelas dan latar belakang seperti perayu, tiba-tiba hilang kawalan diri seketika, yang akibatnya menyebabkan perayu membunuh si mati. Mahkamah berpuas hati dengan hujahan perayu bawah dia tidak tahu atau syak akan hubungan si mati dengan Suprel kerana pengetahuan terdahulu tentang hubungan sulit sudah diselesaikan pada Disember 2013. Apa-apa teori kekal spekulasi dan ini yang, paling tidak, boleh disamakan dengan kesimpulan hakim bicara dalam perenggan 46–53 penghakiman beliau. Kesimpulan-kesimpulan ini bukan berdasarkan keterangan di mahkamah atau boleh dikesan semula melalui pemeriksaan beberapa saksi. Teori-teori ini tidak dikemukakan kepada perayu atau mana-mana saksi yang dipanggil dan tidak selamat untuk mensabitkan tertuduh seperti yang dipertuduh berdasarkan hal keadaan ini (lihat perenggan 52–54).

(3) Tiada asas bagi hakim bicara untuk menyimpulkan bahawa pernyataan beramaran perayu bukan keterangan sokongan kerana tidak selaras dengan pembunuhan tetapi direkodkan 18 hari kemudian lantas memberinya masa untuk memikirkan apa yang hendak dikatakan kepada pihak polis. Kelewatan memberi pernyataan beramaran dijelaskan oleh pihak pembelaan tetapi hakim bicara gagal mempertimbangkannya. Kegagalan ini menjejaskan kes pihak pendakwaan dan memprejudis perayu dengan serius, menjadikan sabitan tidak selamat dan boleh diketepikan. Oleh kerana perayu mengelar lehernya, dia tidak boleh bercakap dengan betul dan tidak berada dalam kedudukan memberi pernyataan beramaran lebih awal daripada waktu yang diberinya. Akibatnya, pernyataan beramaran boleh menjadi keterangan sokongan berdasarkan fakta dalam kes ini. Pembelaan yang dinyatakan dalam pernyataan beramaran dan yang dikemukakan semasa perbicaraan oleh perayu kekal sama dengan konsistennya (lihat perenggan 32 & 34–36).

(4) Hakim bicara memberi penekanan tidak wajar dan tidak munasabah terhadap percakapan antara perayu dan si mati yang didengar oleh penghuni-penghuni lain di dalam rumah sebelum beliau

mempertimbangkan kewujudan keterangan tersebut kredibel. Perayu tidak, pada bila-bila masa, mengatakan percakapan tersebut kuat atau bahawa terdapat jeritan atau suara yang kuat. Dalam kedua-dua pernyataan beramaran dan testimoninya, perayu menyatakan bahawa si mati bercakap dengan normal dan perlahan. Secara materialnya, hakim bicara terlepas pandang fakta bahawa Agus dikejutkan oleh jeritan si mati dan, walaupun demikian, ini hanya mengejutkan Agus dan bukan Damin walaupun Damin tidur bersamanya di dalam ruang tamu yang sama. Tanpa keterangan yang konsisten, walaupun datang daripada tertuduh sendiri, mahkamah ini tidak terpujuk untuk menyimpulkan bahawa sememangnya berlaku percakapan antara perayu dan si mati (lihat perenggan 39 & 42).

(5) Berdasarkan keterangan, hakim bicara terkhilaf dalam menyimpulkan Suprel tidak wujud dan bahawa tiada hubungan antara Suprel dengan si mati. Tidak konsisten bagi hakim bicara membuat kesimpulan bahawa tiada orang ketiga sedangkan kes pihak pendakwaan sendiri merujuk pada kewujudan orang ketiga, seorang lelaki yang sering menghubungi si mati. Malah pegawai penyiasat, PW12 bersetuju bahawa Suprel mungkin seorang pekerja pendatang haram yang tidak ingin ditermui, khususnya dengan berlakunya kejadian dan kematian si mati ini (lihat perenggan 43–44 & 46).]

Notes

For cases on murder in general, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1717–1842.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ Rep 101, FC (refd)
Ikau Anak Mail v PP [1973] 2 MLJ 153, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] CLJ Rep 130, FC (refd)
Mat Sawi bin Bahodin v PP [1958] 1 MLJ 189, CA (refd)
Ngu Chee Wui v PP [2014] MLJU 1720, CA (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
PP v Subir Gole [2015] 2 MLJ 642; [2015] 2 AMR 393, CA (refd)
Vijayan v PP [1975] 2 MLJ 8 (refd)

Legislation referred to

Criminal Procedure Code s 112
Penal Code ss 300, Exception 1, 302, 304(a), 309

Appeal from: Criminal Trial No MYY-45B-3/8 of 2014 (High Court, Miri)

Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appellant.
Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mary Lim JCA:

[1] The appellant was charged under s 302 of the Penal Code for intentionally causing the death of his wife. He was also charged with the offence of attempted suicide under s 309 of the Penal Code. The details of the two charges are as follows:

> First Charge
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> Bahawa kamu pada 16.1.2014 jam lebih kurang 2.00 pagi, bertempat di bilik tidak bernombor, kuarters pekerja, Blok MIRI LKS 8, Ladang Kuala Suai, Tradewinds Plantation Sdn Bhd Suai, Batu Niah, Miri, di dalam Daerah Miri, di dalam Negeri Sarawak telah membunuh Salasiah Binti Jama (P)(Passport AS623625) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
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> Second Charge
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> Bahawa kamu pada 16.1.2014 jam lebih kurang 2.00 pagi bertempat di bilik tidak bernombor, kuarters pekerja, Blok MIRI LKS 8, Ladang Kuala Suai, Tradewinds Plantation Sdn Bhd Suai, Batu Niah, Miri di dalam Daerah Miri, di dalam Negeri Sarawak, cuba membunuh diri dengan perbuatan, iaitu dengan menikam perut, mengelar leher kamu dengan sebilah pisau dan dengan perbuatan ini kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 309 Kanun Keseksaan.

[2] It is the prosecution's case that the deceased's death was as a result of injuries intentionally inflicted by the appellant. That is to say that in inflicting the injuries which resulted in the deceased's death, the appellant either caused them with the intention of causing death, or caused the injuries which the appellant knew to be likely to cause the death of the deceased, or caused the injuries with the intention of causing bodily injuries that such bodily injuries were sufficient in the ordinary course of nature to cause death or caused them with the knowledge that the acts were so imminently dangerous that they must in all probabilities cause death and committed such acts without any excuse for incurring the risks of causing death or such injuries as aforesaid.

[3] The prosecution's case was one founded entirely on circumstantial evidence. Relying on the Federal Court's decision in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101 which cited *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] CLJ Rep 130, the learned DPP submitted that there was no impediment as the evidence

led 'irresistibly point to one and only one conclusion, the guilt of the accused':

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the Court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt.

[4] At the close of the prosecution's case, the appellant conceded that the prosecution had established a prima facie case against him in respect of the second charge of attempted suicide. In respect of the first charge, the appellant also conceded that he had killed his wife. However, he submitted that the evidence and facts adduced through the prosecution's witnesses had established the defence of grave and sudden provocation by the deceased. The appellant urged the learned trial judge to reduce the charge to one punishable under s 304(a) of the Penal Code.

[5] The learned trial judge rejected the defence choosing instead to agree with the prosecution that the defence of grave and sudden provocation was not established by the appellant. The learned trial judge found the appellant guilty as charged and convicted him on both charges. The appellant was sentenced to death in respect of the offence under s 302 of the Penal Code while a sentence of six months imprisonment from the date of his arrest was imposed in respect of the offence under s 309 of the Penal Code.

[6] The appeal before us was against both the conviction and sentence although as it turned out, the real and narrow ground of appeal was on the matter of the defence that was raised, that the appellant had acted under grave and sudden provocation, and the fact that he had attempted suicide showed the extent of the loss of self-control that the appellant suffered at the material time. The concession made at the end of the prosecution's case, that a prima facie case has been established, is maintained in this appeal.

[7] We heard the appeal and after due consideration of the submissions of both counsel for the appellant and learned DPP on the issues raised, we unanimously allowed the appeal finding that the defence had indeed raised some doubt on the murder conviction under s 302. We consequently reduced the charge to one under s 304(a) of the Penal Code. After hearing pleas in mitigation and submissions of the learned DPP, we sentenced the appellant to a term of imprisonment of 18 years from the date of arrest. We now proffer our reasons.

FACTS OF THE CASE

[8] The facts surrounding the death of the deceased are as follow. The appellant and Salasiah bt Jama ('the deceased'), both Indonesians, were husband and wife for 13 years before her tragic death. Both came to Sarawak to work at Ladang Kuala Suli ('the plantation'). The appellant was a palm fruit harvester whilst the deceased was a weed killer sprayer at the plantation. The appellant and the deceased have a ten year old son staying with the grandmother in Goa South Sulawasi. The deceased's brothers namely Agus Jama and Damin Jama also worked at the said plantation.

[9] The appellant and the deceased were allotted quarters within the said plantation ('the house'). The appellant and the deceased occupied one room ('the said room') of the house whilst another was occupied by two others, Salasing and Ciya Rabai. The deceased's brothers, Agus Jama and Damin Jama stayed in the living room of the house. There was another room in the house but it was not occupied.

[10] On 16 January 2014, at about 2am, Agus Jama ('PW8') and his brother Damin were woken up by the deceased's screams for help from the said room. PW8 knocked several times on the door to the said room but there was no response. PW8 then saw blood seeping out from under the door of the said room. PW8 informed Hendra, a mandor of the plantation who then called Denial ak Rentap ('PW6'), the supervisor of the plantation. PW8 did not see the inside of the said room ('the crime scene'). When Junaidi bin Hassan ('PW5') the assistant manager at Ladang Kuala Suai arrived and entered the house together with his manager, Nasrul Affendy at around 3.40am, PW5 testified that the door to the said room was slightly open. From that slightly opened door, PW5 saw the two bodies of the appellant and the deceased. PW5 then called the police station at Batu Niah.

[11] That call was picked up by the officer on duty, L/Cpl Muhammad Zullizam bin Rejab ('PW4') who lodged a first information report No Batu Niah/000093/14 ('exh P10'). A police team was despatched to the scene. PW4 also called ASP Soliment Nyian ('PW12'), the investigation officer ('IO') who then led a team comprising SI Khor Hang Seng, Sgt Drahman, Cpl Bayan, and L/Cpl Shahdan Hamdan ('PW1'), a photographer. When the team arrived at the house, PW12 was not able to enter the said room as it was blocked by the appellant's body. But, through the window of the said room, PW12 was able to see the bodies of the deceased and the appellant, both of which were covered in blood. PW12 noticed the appellant was breathing. He then 'forced entered' the said room. On checking the appellant, he found him to be alive and this was confirmed by a medical staff of the plantation. PW12 saw many injuries on the deceased. He instructed PW1 to take photographs of the appellant and the

deceased as well as the crime scene ('exh P4(1–27)'). The appellant was sent to Hospital Bintulu on PW12's instructions.

[12] A post-mortem was carried out on the deceased by Dr Norliza bt Ibrahim ('PW9'), a pathologist from the Sarawak General Hospital, Kuching on 24 January 2014 at Miri Hospital mortuary. PW9 testified in detail on both the external and internal injuries she had found upon examining the body of the deceased. PW9 testified that the cause of death of the deceased was chest and intra-abdominal injuries due to stab wound. PW9 also took and gave to PW12 blood specimens taken from the deceased.

[13] Dr Ernest Ong Cun Wang ('PW10') was on duty on 16 January 2014 when the appellant was admitted to the Bintulu Hospital. He was however, not the first doctor who attended to the appellant; he was only involved in the subsequent care of the appellant until the appellant was discharged. According to PW10, the appellant had already been admitted to the ICU of Bintulu Hospital when he saw him. PW10 testified that the appellant was 'ventilated on tracheotomy'. PW10 testified that there was a laceration wound on the appellant's neck exposing his airway with severe bleeding when he was first brought into the emergency department. An emergency surgery was then performed to repair the appellant's trachea, insert a tracheotomy tube and suture his external wounds. PW10 told the court that the appellant's injury was caused most likely by a penetrating sharp object, could possibly be self-inflicted and could cause death. PW10 who prepared a medical report marked as exh P42 further told the court that the appellant was in the hospital for two weeks.

[14] During the trial, PW10 was invited by the defence counsel to look at a scar on the abdomen of the appellant. Learned counsel suggested to PW10 that the scar referred to the injury when the appellant was admitted to the Bintulu Hospital. Upon examination, PW10 agreed that there were two scars, one at the upper mid line of the abdomen and the other at the right lateral to the first scar. PW10 agreed that the wound could have been caused by a sharp object. PW10 also agreed that there could be hesitation marks on both the injury to the abdomen and the neck. PW10 further agreed that in the space 'under history' of exh P42, it was recorded that the appellant was alleged to have attempted suicide. PW10 was not the doctor who performed the surgery on the appellant; that was done by a Dr Walied Abu Zeid who was not called to testify.

[15] The prosecution submitted that it had amply established its case including the ingredients of intention under s 302 by the inferences arrived at from all the evidence led. It had proved that Salasiah bt Jama had died; that she had died because of the injuries suffered by her; that she had sustained these injuries from the stab wounds inflicted by the appellant using parang

(exhs P16A and P20B); and that the appellant inflicted these injuries with every intention of causing her death. Although there was no eye witness who actually saw the appellant stabbing his wife, the learned DPP submitted that all the evidence led proved the prosecution's case. Such evidence included the condition of the appellant when he was first found by the IO and the evidence of the doctor who treated him, that the appellant's own injuries were self-inflicted when he tried to commit suicide, and that the appellant did not challenge the charge of attempted suicide under s 309 of the Penal Code.

[16] After subjecting the evidence led by the prosecution to maximum evaluation, the learned judge was satisfied that the prosecution had established a prima facie case for the two charges preferred against the appellant. Defence was then called and the prosecution offered five witnesses to the appellant.

[17] The appellant did not call any of them; instead he elected to give evidence under oath. It is his evidence which forms the substratum of this appeal. We shall set out what he first told PW12 as recorded in his cautioned statement marked exh D1. After describing how he and his wife came to be in Niah and the general layout of the house, the appellant told PW12 the following:

> Pada 15.1.2014 jam lebih kurang 7.00 malam saya masuk ke dalam bilik untuk tidur. Manakala isterinya saya datang kemudiannya dan jam berapa saya tidak ingat. Bila dia masuk ke bilik tidur dia terus mengatakan bangun kamu. Saya terus bangun dari tidur dan duduk di sebelah isteri saya dan masa itu diapun duduk.
>
> Lalu dia mengatakan kepada saya yang dia tidak suka kepada saya lagi, dan dia cakap dia perpacaran (hubungan) dengan lelaki lain yang dikenali dengan nama Suprel. Saya tanya isterinya siapa lelaki bernama Suprel ini. Dia cakap Suprel berbangsa Timur Mangrai dan bekerja angkat buah sawit di Tanjung Payung iaitu bersebelahan dengan ladang tempat kami bekerja. Tempat tinggal dia di Kem 21. Saya mengatakan kepada isterinya supaya jangan buat begitu kerana akan memalukan kerana ada ramai keluarga di sini dan lagipun kami ada seorang anak yang masih kecil. Isteri saya mengatakan kepada saya yang Suprel masih muda dan saya sudah tua. Dia cakap lagi jangan kacau Suprel.
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> Mendengar isteri saya mengatakan begitu saya tersangat marah dan saya terus ambil pisau yang saya letakkan di bawah bantal saya serta terus menyerang isteri saya dengan pisau ini iaitu sejenis pisau yang kami panggil badek.
>
> Oleh kerana saya tersangat marah, saya tidak ingat di bahagian mana badan isteri saya kena tikam dulu. Saya tidak pasti sama ada isteri saya lawan balik atau tidak. Sayapun tidak pasti sama ada isteri saya berteriak minta tolong atau tidak.
>
> Setelah saya pastikan isteri saya telah mati, saya berdiri di depan pintu bilik tidur kami dan terus menikam perut saya sendiri sebanyak dua kali dan kemudiannya saya mengelar leher saya sendiri menggunakan pisau yang sama. Seterusnya saya perlahan-lahan duduk di depan pintu. Selepas itu saya tidak tahu apa yang berlaku.

[18] Before the learned judge, learned counsel for the appellant submitted that the words uttered by the deceased amounted to ill treatment and mental torture that resulted in the appellant losing his self-control. The deceased provoked the appellant by telling him that she did not like him anymore and that she was having an affair with a man named Suprel. Despite the appellant's attempts at reasoning with the deceased, the deceased further provoked the appellant when she told him that Suprel was young and that the appellant was an old man. The deceased added insult to injury when she compared the appellant's manhood and sexual performance to that of Suprel's and saying that Suprel's sexual performance was better than the appellant's. The proverbial straw that broke the camel's back was when the deceased told the appellant not to disturb Suprel and this was right after commenting and comparing the two sexual performances with Suprel coming out better when compared with the appellant's. The embarrassment of his family breaking up was too much for the appellant to bear especially in a Bugis Indonesian community, whether at the plantation or at home back in Indonesia. Learned counsel for the appellant submitted that any reasonable man of the appellant's race, religion, class and background would have been provoked in similar circumstances of the case.

[19] Learned counsel for the appellant submitted before the learned judge that on the evidence of the prosecution's witnesses and the cautioned statement of the appellant, he had raised, at the very least, the defence of grave and sudden provocation which entitled the appellant to a reduced charge under s 304(a) of the Penal Code. The appellant argued that he had established on a balance of probabilities that:

(a) there was no cooling-off period for the appellant to have calmed down to the level of being able to think rationally;

(b) that the provocation came from the deceased at the ungodly hour of 2am in the morning while the appellant was suddenly woken up from his sleep;

(c) that the words uttered by the deceased were grave and provocative;

(d) that the provocation was sudden and the appellant had no inkling or suspicion that the deceased was having an affair with another man;

(e) that the appellant justifiably went into a rage where he lost his power of self-control;

(f) that the appellant did not have a prior motive to kill the deceased; and

(g) that the act of the appellant killing the deceased was not premeditated.

[20] The learned DDP submitted otherwise contending that the defence of grave and sudden provocation was not available because:

(a) there was no provocation; and

(b) if there was any, it was neither grave nor sudden.

[21] For the defence of provocation to be available, the dual conditions as stipulated in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 must be met: the alleged provocative conduct must be such as actually causes in the appellant, the alleged provocative conduct might also cause in a reasonable man, a sudden and temporary loss of self-control as a result of which the appellant kills the deceased. Learned DPP submitted that the alleged provocation was the extramarital affairs which was already known to the appellant for quite a while. Further, there was no quarrel nor any heated exchange of words at the time of the incident. When the deceased told the appellant that she no longer liked him and that she was having an affair with Suprel, the appellant did not react immediately. Instead, he had time to reason with the deceased and tell her not to do it. The prosecution submitted that this showed that the appellant did not lose his self-control. The appellant's action to the alleged words by the deceased was also not proportionate. The appellant acted in a brutal fashion, cruel and unusual manner. The nature and number of the injuries sustained by the deceased also showed a clear intention on the part of the appellant to murder the deceased. There was therefore, no doubt, not even a reasonable one that had been raised by the appellant such as to afford the appellant a reduced charge under s 304(a) of the Penal Code.

DECISION OF THE HIGH COURT

[22] The learned judge agreed with the prosecution. His Lordship did not think there was ever this 'so called provocation conversation' or that there was even a Suprel to begin with. It was the learned judge's view that the appellant could not rely on his cautioned statement and the evidence of PW12 to prove the existence of provocation by the deceased. Quite apart from the fact that PW12 was merely testifying on the record of the evidence as told to him by the appellant and therefore not capable of being corroborative evidence, the cautioned statement was recorded 18 days after the incident. It was, therefore, not a contemporaneous statement made by the appellant. The appellant had had time to 'ponder what to say to the police and such statement made by the accused recorded in D1 might not necessarily be the truth'. PW8 also testified that he was awoken by the deceased's screaming once '*Alle'a*' which in Makasar language was a shout for help.

[23] So, in essence, the learned judge disbelieved the appellant and found that the murder was premeditated and His Lordship went on to convict the appellant under s 302 of the Penal Code.

A THE APPEAL

[24] As stated at the outset of these grounds, the substance of the appellant's petition of appeal pertains to the matter of his defence. The real and only question for determination is whether in the facts and circumstances of this B case, has the appellant been rightly convicted under s 302 of the Penal Code. If the answer is in the negative, to proceed to the further matter of whether the act attributed to the appellant would constitute a lesser offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code.

C **[25]** The prosecution's submission is the answer to the primary question is in the affirmative, that the whole murder was planned. The appellant's contention is that he had no intention to kill his wife; that the act of stabbing of the deceased was committed as a result of sudden and grave provocation.

D GRAVE AND SUDDEN PROVOCATION

[26] We start with the law on the defence of provocation which is encapsulated in Exception 1 to s 300 of the Penal Code. It reads:

E > Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to three provisos:
>
> F (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> G (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> Explanation — whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

H **[27]** The meaning, operation and application of Exception 1 to s 300 has been explained quite comprehensively in several landmark decisions. There are no less than three Federal Court decisions on this defence and how the defence is to be considered. These three decisions were considered and followed I recently by the Court of Appeal in *Public Prosecutor v Subir Gole* [2015] 2 MLJ 642; [2015] 2 AMR 393 which decision was affirmed by the Federal Court. In this recent decision, Mohd Zawawi Salleh J described the 'doctrine of provocation is a concession to human frailty or infirmity, a recognition that a lower standard of criminal responsibility should apply to one who kills when he

is 'for the moment not master of his mind'. This approach to defence hinges on the notion of loss of self-control. Its rationale is that provocative conduct, when it is sufficiently serious, is capable of inflaming anger to such degree as to be likely to lead the provoked person to lose his self-control and retaliate in violence. When the provoked person loses self-control, he is unable to weigh up the consequences for his action according to reason (see *Jeremy Horder Provocation and Responsibility* (Oxford: Clarendon Press, 1992))'.

[28] We can do no better than to set out the principles as enunciated in the Federal Court decision of *Che Omar bin Mohd Akhir v Public Prosecutor* where at p 316 (MLJ); at p 291 (CLJ), the Federal Court said:

> ... Thus, in order to bring the case within the exception it is necessary that the following facts should be established:
>
> (i) the offender must have done the act whilst deprived of the power of self-control;
>
> (ii) he must have been so deprived by reason of the provocation;
>
> (iii) the provocation must have been grave and sudden;
>
> (iv) the provocation must not have been sought by the offender;
>
> (v) it must not have been voluntarily provoked by the offender as an excuse for doing the act;
>
> (vi) the provocation must not have been given by anything done:
>
> (a) either in obedience to the law; or
>
> (b) by a public servant in the lawful exercise of his powers as such or
>
> (c) in the lawful exercise of the right of private defence (see *The AIR Manual* (5th Ed, 1989) p 927)
>
> [14] The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law (see Explanation to Exception 1 to s 300 of the PC; *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211; [1985] 1 CLJ 150; [1985] CLJ Rep 174 Federal Court). Each case is to be considered according to its own facts. The court must decide on the particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused, (see *Ratanlal & Dhirajlal, The Indian Penal Code,* (29th Ed 2002 p 1194).
>
> [15] The test of grave and sudden provocation was clearly stated in the Supreme Court case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143; [1988] 1 CLJ Rep 162. Seah SCJ in delivering the judgment of the court said:
>
> > The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra AIR* [1962] 605, 630).

> In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncrasies of the accused: *Madhavan v State of Kerala AIR* [1966] Ker 258 (260).
>
> [16] It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as (i) actually causes in the accused, and (ii) might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased.
>
> [17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation (see Ratanlal & Dhirajlal, p 1192; *Vijayan v Public Prosecutor* [1975] 2 MLJ 8).

[29] The appellant will, therefore, have to prove that not only did the acts of the deceased deprived him of his power of self-control, but that such acts would also have deprived a reasonable man of the power of self-control — per Tun Azmi LP in *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153. However, if the retaliation of the appellant is entirely out of proportion to the provocation offered the plea of grave and sudden provocation fails as per Choor Singh J in *Vijayan v Public Prosecutor* [1975] 2 MLJ 8, and it goes without saying that it is the appellant who bears the burden of proving all the essential elements mentioned above before he can properly claim a defence of sudden and grave provocation meriting a reduction of charge. In proving his defence, the appellant needs to meet the threshold of a balance of probabilities. The appellant needs to create a reasonable doubt as to the integrity or safeness of the conviction. Where doubt is present, then the conviction is unsafe and the benefit must be given to the appellant. On the meaning of 'reasonable doubt', there is some guidance from the view expressed by Sharma J in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16:

> ... The following definition of 'reasonable doubt' is often quoted: it is not mere possible doubt, but because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[30] In our present case, the learned judge:

(a) did not believe that there was a conversation between the appellant and the deceased — see paras 43 and 47;

(b) did not believe that there was a Suprel — see para 42;

(c) believed that this person 'Suprel' was probably made up by the appellant — para 42;

(d) believed that the appellant was 'suspicious, jealous and angry' because of the telephone calls that the deceased was receiving, that the deceased was going to watch movie all too frequent to his dislike and not going to sleep at the same time as him — see para 48;

(e) did not believe the appellant's explanation about a Bugis tradition to keep a knife under the pillow to ward off the devil — see para 49; and

(f) rejected the cautioned statement because it was not made contemporaneously but some 18 days after the incident.

[31] We shall examine each of these findings and conclusions starting with the issue of the cautioned statement in exhibit D1 which was rejected by the learned judge as the defence first arose in that statement. PW12 was cross-examined on the contents of D1. We first agree with the learned judge that although PW12 recorded the statement from the appellant, this does not make him the owner of the basic contents of the cautioned statement. He merely recorded what he was told by the appellant and he merely recorded his questions to the appellant and the answers to those questions. He is not the primary source of the contents of the statement and he is in no position to hold out to its truth save where he has investigated or verified the same. Even to that extent, he may only testify to the verifications made.

[32] However, we disagree with the learned judge that the cautioned statement was 'not capable of being corroborative evidence' because it was not a contemporaneous statement made by the appellant as it was recorded 18 days after the incident. The learned judge felt that the appellant had had time to 'ponder what to say to the police and such statement made by the accused recorded in D1 might not necessarily be the truth'. In this regard, we do not find any basis for the learned judge to have arrived at this conclusion. We find that the delay in giving that statement has been more than adequately explained by the defence. However, the learned judge has failed to give any regard to the explanation. This failure is detrimental to the prosecution's case rendering the conviction as charged, unsafe and liable to be set aside, which we do. In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, the trial judge had rejected the defence after finding that there was a belated disclosure of the defence. The Federal Court found that the trial judge had erred in his handling of the facts when considering the defence case. After setting out the trial judge's reasons for his rejection, the Federal Court said:

> It is implicit in the judge's observations aforesaid that he had assumed that at the time of his arrest, the appellant had no explanation to offer or if he had one, it would

have been materially different to that which he had offered in his cautioned statement recorded on the next day or he would have made a confession. When respect, there was not a scrap of evidence to support any of these assumptions. For example, there was not even evidence as to whether the appellant had been cautioned and an attempt made to interrogate him immediately on arrest and, if so, what his reactions were.

[33] The Federal Court examined the evidence and concluded:

> Thus, the evidence suggests that the first opportunity the appellant had to explain was at the time he was interviewed and his cautioned statement recorded from him the day after his arrest. There was, therefore, no evidence of delay on his part in offering an explanation. On the other hand, evidence suggests that such delay, as there was in this regard, had been occasioned entirely by the police. It follows that it was wrong for the judge to have assumed, contrary to the evidence, that there had been a belated disclosure of the defence, which suggested concoction. On the contrary, the evidence indicated that, given the circumstances, the appellant had made prompt disclosure of his defence in his cautioned statement.
>
> As a result of this misdirection, the case for the appellant must have been seriously weakened in the eyes of the judge, and the chance of his attaching any degree of credence to it seriously prejudiced.

[34] We find this to be so true in the facts and handling of the evidence in this trial. With the serious misdirection and misapprehension of the facts, the learned judge here had wrongly disregarded the cautioned statement in D1 which ruling had seriously prejudiced the defence of the appellant.

[35] Now, it must not be overlooked that the prosecution's case and charge is that at the material time, the appellant had also attempted to commit suicide. He had not only stabbed himself, he had also slit his own throat. That injury was serious enough to warrant a tracheostomy and a circumstance where the appellant was in no position to give any testimony or assistance to the police, including giving his cautioned statement. This is quite evident from PW12's testimony. According to PW12, the appellant was unconscious at the time of the incident (16 January 2014). He was still in that state the following day. It was not till the 27 January 2014 that the appellant was arrested and that was while the appellant was still at the Bintulu Hospital. He was then transferred to Miri Hospital. Upon arrival, he was conscious but 'still could not talk properly'. On 28 January 2014, the appellant was conscious and could speak slowly. It was at this point that the appellant was informed by PW12 that he would be remanded in the afternoon and he was then informed of his right to engage counsel. The appellant's cautioned statement was then recorded on 3 February 2014. In his evidence-in-chief, PW12 said that he could not record the appellant's s 112 cautioned statement any earlier because the appellant was not able to speak clearly due to the injury to his throat — see NOP at pp 142 and 153–154.

[36] The whole period has been accounted for, and not a single day can be properly ascribed as a delay; and certainly not one which can be attributable to the appellant. There is no evidence that the appellant was able to give his statement earlier but that he had refused or failed to cooperate until some 18 days later. There is also no evidence that the appellant could speak immediately after the incident but he refused or failed to do so until some 18 days after the incident. On the contrary, the evidence points to cooperation from the appellant and that he could only give his cautioned statement when he did. In the absence of evidence to show that the appellant could give evidence on the very day of the incident and that he had refused or failed to do so, benefit of doubt ought to and must be given to the appellant; particularly in the case of capital offences. We consequently find that the cautioned statement in D1 is capable of being corroborative evidence in the facts of this case. Whether it in fact does is something that the learned judge needed to consider and decide. Had the learned judge done so, he would have attached the appropriate credence to D1. He would have found that the defence then offered in his cautioned statement and that which was proffered at trial and told by the appellant remained consistently the same. This consistency strongly indicates credibility to the defence or at least to the material events and sequence of events that took place at the 'ungodly hour of 2am of the 16.1.2014 that had caused the accused to lose control and did what he did so brutally by inflicting 33 injuries on the deceased'.

[37] On the matter of whether there was even a conversation at all between the appellant and the deceased, the learned judge concluded that there was never any. His Lordship was of the view that the evidence of PW8 and the appellant show that there was no such conversation at all. It is absolutely vital that the existence of the conversation must first be established. For there to be provocation, there must exist this conversation where the deceased purportedly uttered the words described by the appellant. The learned judge compared the evidence of PW8 (Agus Jama who was one of the deceased's brothers and who stayed in the living room of the house) with that of the appellant (see paras 44 and 46) and concluded that there could not have been this 'conversation'. At para 44, His Lordship explained that he could not accept that there was this alleged conversation because it 'was not heard by PW8, Damin, Salasing and Ciya Rabai, they being in the same House'. His Lordship went on to say that:

> Such conversation would truly be 'a whispering' and it is I think not normal to whisper when one is angry or 'naik marah' as the accused had put it.

[38] It was His Lordship's view that if there was such a conversation as alleged by the appellant, 'such a conversation between the two would have blown into shouting or at the least in high rise voice because the accused was already extremely angry. But there was none of this here. There was no angry or loud voice from the accused. It was all quiet and at 2am in the morning I think it was

even all the quieter because the surrounding would be quiet …'. Yet, none of the other occupants of the house heard the so-called 'conversation'.

[39] With respect to the learned judge, again, we are of the view that he has seriously misapprehended the facts. There was unnecessary and unreasonable emphasis on having the alleged conversation heard by the other occupants in the house before its existence could be considered credible. What His Lordship had materially overlooked was that at no time did the appellant say that the conversation was in loud tones, or that there was shouting or raised voices by him or the deceased. What the appellant testified in his cautioned statement as well as in his evidence in the dock was that the deceased had spoken with him and 'cara dia bercakap biasa sahaja dengan nada suara yang perlahan' — see para 46. Although the appellant had talked about his reaction to what the deceased said, that he had 'naik marah' and that he 'became extremely angry', at no time did he say that he had raised his voice or that he had shouted; or that the deceased had done either or the same. There was, to our mind, no basis for the learned judge to require that the conversation should have been heard by the others in the house. Such a conversation, regardless of the hour, need only be audible to the two persons in conversation. After all, it was a conversation between a husband and his wife, in the intimacy of their bedroom, and in the early hours of the morning. What we find materially overlooked by the learned judge was the fact that PW8 was woken from his sleep 'by the deceased's screaming '*Alle'a*' (in Makasar language) which was a shout for help … PW8 said he only heard this once …'. It was a scream which woke PW8 from his sleep; and even then, it woke only PW8 and not Damin though he too, was sleeping in the same living room as PW8. It certainly did not wake the other two occupants in the house, and these two other occupants, Salasing and Ciya Rabai, in any event did not testify.

[40] In reaching his conclusion that there was no conversation ever between the appellant and the deceased, the learned judge had found discrepancies between the appellant's version of the events of the evening before the incident with that of PW8, especially on when the deceased was actually in the said room. The learned judge believed PW8 who was sleeping 12 feet from the said room:

> [44] At 7pm the accused entered the said room as he was going to sleep … PW8 said the deceased went into the said room around 8pm. At 2am PW8 was woken up when he heard the deceased's screaming '*Alle'a*' (in Makasar language) which was a shout for help … PW8 said he only heard this once … PW8 and Damin knocked on the door of the said room several times but there was no response then they saw blood seeping out under the door of the said room … PW8 then called the mandor Hendra who had called PW6 …
>
> [45] But the accused's version was that the deceased entered the said room but he did not know what time it was. The accused said the deceased woke him up and

related what the deceased said: *'... dia tidak suka kepada saya lagi, dan dia cakap dia perpacaran (hubungan) dengan lelaki lain yang dikenali dengan nama Suprel'; '... Suprel berbangsa Timur Mangarai dan bekerja angkat buah sawit di Tanjung Payung ...', '... Isteri saya mengatakan kepada saya yang Suprel masih muda dan saya sudah tua. Dia cakap lagi jangan kacau Suprel'.*

[41] What the learned judge had materially overlooked is that the appellant himself had also said in his cautioned statement that he had gone into the said room at 7pm. Although PW8 had testified that he saw his sister enter the said room at 8pm, he agreed with learned counsel for the appellant that he was unable to say if his sister had stepped out again or whatever happened thereafter since he himself had gone to sleep also at 8pm and, he did not wake up until 2pm. Even then, it was by a scream. The learned judge did not evaluate this part of PW8's evidence; once more, had he done so, he would have given credence to the appellant's version of the facts.

[42] With the consistency of evidence, although it was only from the accused himself, we are inclined to conclude that there was, indeed, such a conversation. We are fortified in reaching this conclusion when we have regard to exactly what was supposedly said in that conversation. To do that, we need to consider the matter of Suprel. The learned judge concluded that there was no such person, that 'this person Suprel' was probably made up by the accused because the police would definitely have gone to the Tanjung Payung and Kem 21 to look for him but yet they could not find him. In the learned judge's view, if there was such a person called 'Suprel', the police would have found him.

[43] The difficulty we have with this conclusion is that it is not supported by the evidence before the court. What PW12, the IO, had actually testified is that he had 'asked the people in the surrounding area but nobody know'. PW12 never testified that he went to the Tanjung Payung and Kem 21, the specific places mentioned by the appellant, that these were the 'surrounding area' meant, and that nobody there knew of such a person called Suprel. It is more likely than not that PW12 never went to Tanjung Payung. Had he gone to Tanjung Payung, he would have said so. Instead, his answer was only to 'surrounding area', whatever that area may be. Given these circumstances, it was certainly erroneous for the learned judge to conclude that the appellant was clever at lying and that Suprel did not exist and as such there was no affair between the deceased and Suprel.

[44] What has been startlingly overlooked is the fact that the prosecution's case itself makes reference to the existence of some third person or party. It is our view that, contrary to the finding of the learned judge, this other person was certainly not made up. In the prosecution's case, PW5 had testified that the appellant had seen him back in November 2013 and had told him that he had

a problem. He had suspected the deceased was always calling another man and he sought permission to return to Indonesia to solve the problem. However, in December 2013, the appellant withdrew his application as the matter was settled. This clearly shows that there was a third person involved, a male. Since the prosecution's case proceeded on the basis of the existence of some third person, it was quite inconsistent for the learned judge to then arrive at his decision that there was no such third person. Paragraphs 46–53 are set out to show how the learned judge reached his decision:

> [46] ... I think it is normal to be angry and also to be speaking in an angry voice and ought to be loud at that. I would think that such a conversation between the two would have blown into shouting or at the least in high rise voice because the accused was already extremely angry. But there was none of this here. There was no angry or loud voice from the accused. It was all quiet and at 2am in the morning I think it was even all the quieter because the surrounding would be quiet, yet the so called conversation between the accused and the deceased was not heard by PW8, Damin, Salasing and Ciya Rabai, they being in the same house. Such conversation would truly be 'a whispering' and it is I think not normal to whisper when one is angry or 'naik marah' as the accused had put it. It find that there was no conversation between the accused and the deceased that morning around 2am in the way related by the accused. To me the deceased had gone to sleep having entered the said room around 8pm on the 15 January 2014. I also think the deceased did shout for help once at 2am on the 16 January 2014 which was heard by her brother PW8. In the quietness of that morning around 2am the deceased shout for help would be very audible indeed that had woken PW8 up who had then woken up Damin and both had rushed to knock on the door of the room. It was a natural response for PW8 and Damin who were after all the deceased's brothers.
>
> [47] There was therefore no conversation at all and the so called utterance by the accused (sic) of those words that had provoked the accused around 2am on the 16 January 2014. I think the accused had planned it all to kill the deceased. This plan all started in November 2013 when the deceased was receiving calls from a person unknown to her. The accused had in fact told PW5 about this ... I think this was a problem that was serious enough that the accused had sought permission from PW5 to go back to Indonesia with the deceased. But in December 2013 the accused had retracted their intention to go back to Indonesia as the matters between him and his wife and presumably the so called callers were solved.
>
> [48] I think that the matter of the calls that the deceased were still receiving was probably not solved and may even have gone into a clandestine or nocturnal rendezvous. I think the accused suspected this was still going on. He might have even seen the deceased spending much time on her hand phone after all he had earlier complained to PW5 on the deceased receiving telephone calls from a person unknown to her. He would have also observed the deceased was going out to watch movie all too frequent to his dislike and not going to sleep at the same time as him. It was the accused's evidence that the deceased had gone to watch movie in the evening of 15 January 2014 and came back at unknown time. All these would have effects on the accused. It would be normal and only human for him to be suspicious, jealous and angry. He probably had been keeping all these feelings to himself. He

would not want to tell no one, not even PW5 which he had done earlier. He also did not want to speak to PW8 or Damin or PW7 who are his brothers in law because to him it was shameful.

[49] With all these feelings of suspicion, jealousy and angry (sic) he decided to kill his wife. I think in the evening of the 15 January 2014 he entered the said room around 7.00 pm he put the knife 'badek' ('P16B') under the pillow. The other knife ('P20A') was also in the said room under the cupboard. These two knifes was (sic) very sharp. PW9 testified so. I do not believe what the accused had said that the reason he put the knife under his pillow was a Bugis tradition to ward off the devil. He should have called another witness of this own race to corroborate this assertion. To me it is a fact that the accused by putting P16A under his pillow had armed himself with a deadly weapon. The fact that the accused was armed with a deadly weapon when attacking the deceased led to the irresistible inference that there was intention on his part to cause serious bodily harm or death to the deceased (see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174; [1976] 1 LNS 159 and *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176; [1961] 1 LNS 130).

[50] At 2am when the deceased was soundly asleep and in the quietness of that early morning the accused took out the Badek knife, covered the deceased's mouth either with his left hand or even a piece of cloth and started stabbing the deceased inflicting 33 injuries. When the first stab was inflicted the deceased would have woken up in pain and struggle to free herself and tried to scream but could not due to the cover to her mouth but she was able to shout once which was heard by PW8 then her mouth was covered again until she breathed her last. After making sure she died the accused stabbed himself in the stomach and slitted (sic) his neck in the hope that he too would die.

[51] It is therefore my findings that the accused had planned to kill the deceased. I say so after analysing the facts and the evidence. I find there was no conversation at all between the accused and the deceased on 'Suprel' and 'him being old and Suprel being young' and 'strong in sex' and 'don't disturb Suprel' at 2am on the 16 January 2014. Such conversation would have been heard by PW8, Damin and Salasing and Ciya Rabai since such conversation would be in an angry, rise and loud voice. I also find that the accused had covered the deceased's mouth to prevent her from screaming and might even have restrained her to prevent her from struggling during the stabbing and to make sure he died. To me the deceased would have woken up immediately with the first stab and it would be her human instinct to struggle and fend such further attacks. PW9 said some of the injuries found on the deceased were defensive injuries. The deceased would have screamed but for the cover on her mouth she struggled but was restrained. The evidence showed that she was able to shout only once and heard by PW8. But it was too late she succumbed to the 33 injuries and died tragically.

[52] I also think the accused and the deceased had sexual intercourse that night or even before the accused killed the deceased. In his report ('P46') PW11 said there was semen stains on panties '18' ('P34A') that the DNA profiles developed from semen stains on panties ('P34A') revealed that these were mixed profiles consistent with being contributed by at least two sources namely Tompo bin Yara ('the accused') and Salasing bt Jama ('the deceased'). Now if it was alleged by the accused

A that the deceased was already having an affair with 'Suprel' or that she no longer loved the accused, why would she still want to have sex with the accused unless the deceased had feeling for the accused.

[53] It was also contended by the defence that the accused in inflicting injuries to himself also indicate that he was deprived of self-control and had referred to *Public Prosecutor v Subir Gole* [2015] 2 MLJ 642; [2015] 2 AMR 393. But the prosecution said the act of the person to commit suicide was on his own choice after he caused the death of the deceased. Now the accused said in D1 '*Setelah saya pastikan isteri saya telah mati, saya berdiri di depan pintu bilik tidur kami dan terus menikam perut saya sendiri sebanyak dua kali dan kemudiannya saya mengelar leher saya sendiri menggunakan pisau yang sama*' ... But when the prosecution put to him that 'after you made sure that your wife was dead then you decided to commit suicide', the accused's answer was he 'disagreed'. ... Which version is correct what he said D1 or his testimony in court. To me the accused was not deprived of his self-control because he had the time to check on the wife to make sure she was dead then only he would kill himself. This showed that the accused was conscious of what he was doing and what he needed to do ie, his intention was to kill the deceased and to make sure the deceased was dead. Then he would kill himself. I think the accused's intention was for both of them to die.

[45] Quite aside from the fact that none of these propositions were ever suggested to the appellant or to any of the witnesses, or even suggested by the prosecution, it would appear that the learned judge arrived at all these propositions and conclusions himself; a task which he is not entitled to. There is also no basis for His Lordship to do so especially when the proposition is untested or supported by any evidence whatsoever.

[46] Instead, we have PW12 who agreed with the defence counsel that Suprel could be an illegal worker who did not want to be found; that there were many such workers in the vicinity. We further find the submission of learned counsel for the appellant both plausible and reasonable, that with the turn of events and the death of the appellant's wife, Suprel may well not want to be found.

[47] Having found that there was a conversation between the appellant and the deceased and that there was a third person by the name of Suprel, the next issue is to consider the contents of the conversation, and how it was exchanged between the two individuals concerned. The object being to determine whether such content and exchange fall within the legal understanding of grave and sudden provocation as defined in Exception 1 to s 300 so as to afford the appellant a defence to the charge under s 302. For this, we will have to examine the conversation itself and in this respect, we find that the appellant's version of the conversation has been consistently the same from the very first opportunity to the time of trial and throughout the trial. What he said in his cautioned

statement recorded by PW12 and what the appellant testified in ourt are essentially the same and are as follows.

[48] On 15 January 2014, the appellant had gone to sleep in the said room. He was awaken by the deceased at a time that he could not remember. When she entered the said room, she woke the appellant up to tell him:

(a) she did not like him anymore; and

(b) she was having an affair with a man named Suprel.

[49] The appellant's reaction was to inquire more about the person. Upon learning more about this other person, Suprel from his wife, that she knew Suprel came from Timur Mangrai, that Suprel worked in the next adjoining estate at Tanjung Payung and that she even knew where he stayed, that is, in Kem 21, that the appellant then proceeded to reason with the deceased. He told the deceased to desist with the affair as it would bring shame given that many of their family members were also working in their same place of employment. Furthermore, he reminded the deceased of their young son. The deceased's response to this reasoning by the appellant was to tell the appellant that Suprel was still young (*masih muda*) while the appellant was already old (*sudah tua*). She further compared the appellant's manhood and sexual performance to that of Suprel's, adding that Suprel's sexual performance was better than the appellant's. She then told the appellant not to disturb Suprel (*Dia cakap lagi jangan kacau Suprel*). It was upon hearing this last response from his wife that the appellant felt extreme anger — *Mendengar isteri saya mengatakan begitu saya tersangat marah*. It was at this point that the appellant *'terus ambil pisau yang saya letakkan di bawah bantal saya serta terus menyerang isteri saya dengan pisau ini iaitu sejenis pisau yang kami panggil badek'.*

[50] We find that the conversation was first of all, uninitiated by the appellant. It was initiated by the deceased. To be awaken from one's sleep to be told the words uttered by the deceased, that she did not like the appellant anymore, that she was having an affair with a man named Suprel, was at the very least, surprising, of concern and distressful. The appellant's reaction is in keeping with his temperament (the appellant was 'described as a good person and very normal' — see para 46), as well as that of a reasonable man, which is to find out more details, to verify if there is any truth in what was being told. The appellant proceeded to do that. It was after the appellant was given details, that there was basis for concern and worry that the appellant proceeded to reason with the deceased. Again, this course of conduct as testified by the appellant is quite normal and reasonable but more significant, is the effect this line of conversation had on the appellant. He was learning for the first time of his wife's affair with an individual called Suprel (and that is after being awoken from his sleep), and that his wife knew much of Suprel. Despite his persuasion

A and reasoning, his wife was refusing to desist continuing with the affair. Instead of heeding and sharing his concern for their young son and the embarrassment that would befall if the affair was made public especially with the presence of so many of his wife's siblings in the plantation not to forget others back in Indonesia, she proceeded to insult and mock him by comparing their sexual B performances. It would seem rather obvious that Suprel came out winning and this must have had quite an impact on the appellant for it was his late wife's next words, not to disturb Suprel, that incensed the appellant so much that he, temporarily and completely, lost his self-control.

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[51] This sequence of conversation as described by the appellant in his cautioned statement and in his oral testimony did not differ in any material respect. And, it can be seen that all this was being exchanged and was unfolding within a relatively short span of time with incremental levels of worry, concern D and not to mention stress that comes in the form of potential embarrassment. In fact, huge embarrassment with the presence of no less than three siblings within the plantation itself. As submitted by learned counsel for the appellant, the appellant was being 'bombarded with shocking information which was incrementally making him lose his self-control'; that with the last mocking and E telling off to the appellant that he was 'not to disturb Suprel' thereby putting Suprel before the appellant, her husband; it was indeed the last straw that broke the appellant's self-control, that finally pushed the appellant over the precipice and lose his self-control. In his frenzied fit of anger, incensed and singularly provoked by the deceased, the appellant grabbed the knife from under his F pillow and proceeded to stab his wife. The manner in which he stabbed her, not knowing where, how many times and her reaction, whether she fought back or cried out, all indicate that level of uncontrollable anger, rage and loss of self-control. We agree with the submission of learned counsel for the appellant that to be woken in the dark, told of such shocking news of the affair and the G seriousness of the affair with indications of how long it probably might have been carrying on coupled with the embarrassment of his family breaking up was simply too much for the appellant to bear especially in a Bugis Indonesian community, whether at the plantation or at home back in Indonesia.

H **[52]** We are of the considered view that the appellant was provoked into attacking his wife by his wife's own utterances to him, that the utterances are provocative, angering and humiliating when conveyed to a recipient who is her husband, the appellant. We agree with learned counsel for the appellant that any reasonable man of the appellant's race, religion, class and background I would also have been provoked in similar circumstances of the case. The attempt at suicide is also but another facet or manifestation of that loss of self-control, all provoked by the deceased who instigated and provoked the whole unfortunate episode. We have no doubt that the deceased's provocative words, spoken in the manner and circumstances as described by the appellant

whose credibility was not really tested or challenged by the prosecution, were indeed sufficiently grave and sudden to prevent the appellant's action and reaction of killing of the deceased from amounting to murder. As seen from the tone and cumulative progression of conversation, the appellant suddenly snapped and spontaneously reacted with no time for cooling off, contemplation or pondering of his next course of action or response when the deceased uttered the critical words of telling off the appellant not to disturb Suprel. The appellant was quite clearly taunted and mocked by the deceased such that he reacted in the unfortunate manner that he did. We can appreciate the proportionality of his action to the taunts by the deceased, that as a result of his loss of self-control, the appellant used excessive force.

[53] We are consequently satisfied that on the evidence of the prosecution's witnesses and the cautioned statement of the appellant, the defence of grave and sudden provocation which entitled the appellant to a reduced charge under s 304(a) of the Penal Code has been established on a balance of probabilities. The dual conditions as stipulated in *Che Omar Mohd Akhir v Public Prosecutor* are met. We find that contrary to the findings of the learned judge, the evidence show that the deceased's provocative words uttered in the conversation in the early hours of 16 January 2014 actually caused in the appellant as it might cause in a reasonable man, a sudden and temporary loss of self-control, the result of which the appellant killed the deceased. We are satisfied with the appellant's claim that he was not aware or suspicious of the affair with Suprel since any prior knowledge that he may have had of any extramarital affair was already resolved in December 2013. This appears in the testimony of the appellant as well as that of PW5.

[54] Furthermore, the complaint at the material time was more in the nature of harassment of phone calls as opposed to a relationship problem. Any other 'theory' remains speculative and this is what at best, may be ascribed to the learned judge's conclusions at paras 46–53 which were set out earlier. With respect to the learned judge, none of these conclusions reached is based on evidence before the court or can be traced back to examination of some witness, be it the IO, pathologist or even the manager of the plantation. None of the theories were put to the appellant or any of the witnesses called and it would be wholly unsafe to convict as charged under such circumstances.

[55] This was similarly expressed by the Court of Appeal in *Ngu Chee Wui v Public Prosecutor* [2014] MLJU 1720:

> Finally, we observe that the learned trial judge had, on numerous occasions in his judgment used the expression 'presumably' in describing a fact or an inference of fact. For example, in finding that caution was read to the appellant the learned judge

had said '... presumably notwithstanding the said cautionary words not having stated in exhibit P3 ... '; and again in relation to the issue of possession in particular of exhs P4 and P6, the learned judge had said in para 28 of his detail judgment as follows:

> 28. Now, PW1's spontaneous response when cross-examined 'to give one good reason why it wasn't done (ie examining the inside of the said vehicle and presumably seizing by the police personnel of, inter alia, P4 and P6) was: because he had read — presumably to the accused — the caution under s 37A of the Act. We are of the view that this is not to be encouraged and in inappropriate in any judgment. *A trial judge had an obligation to make a specific and clear finding of facts or an inference of facts based on the evidence before him*. The trial judge should not presume anything. He must decide based on evidence of facts presented before him. The only exception where a trial judge could rely on presumption is where presumption is permissible by law. Even then before the legal presumption is invoked there must be sufficient facts to provide for the foundation to justify the invocation of the presumption. (Emphasis added.)

[56] The case of *Mat Sawi bin Bahodin v Public Prosecutor* [1958] 1 MLJ 189 is also of assistance. At p 191, we quote:

> In our opinion the portion of the summing-up which has been quoted was a misdirection. The question is dealt with in the case of *Holmes v Director of Public Prosecutions* (1946) AC 588 in the following passage from the speech of Viscount Simon LC, at p 597:
>
> > If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the Judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict.

[57] The appellant's testimony on the reasons for his attempted suicide is also insightful as to what operated in the appellant's mind at the material time. According to the appellant, he was driven to suicide because of the deceased's affair which affected his reputation. He was ashamed '*Saya mahu bunuh diri kerana malu dengan perbuatan isteri saya ada hubungan dengan orang lain kerana melibatkan maruah saya*'. The appellant was not afraid of arrest. Instead, it was the embarrassment wrought by the affair:

> Saya betul-betul malu dengan perbuatan isteri saya.

S: Setelah isteri kamu beritahu kamu dia ada hubungan dengan lelaki lain apa perasaan kamu ketika itu?

J: Saya sangat terkejut dan teramat kecewa dengan perangai dia. Ini kerana selama ini kami saling menyayangi. Saya juga ketika itu naik marah.

[58] PW12 who interrogated the appellant believed the appellant and found him credible. In pressing further as to what exactly did his wife say which made the appellant snap, this is what the appellant said:

S: Dalam percakapan isteri kamu, Bahagian mana perkataan yang dikeluarkan oleh isteri kamu menyebabkan kamu teramat marah?

J: Saya hilang sabar apabila dia mengatakan bahawa saya sudah tua. Tambah lagi dia cakap jangan kacau Suprel. Lelaki mana yang tidak marah kalau isteri cakap begitu. Perkataan inilah yang menyebabkan saya hilang sabar dan pertimbangan. Saya teramat marah ketika itu kerana ianya melibatkan maruah saya sebagai lelaki.

[59] We are of the view that in that heightened state and in that early hours of the morning and in that dark room, the words used by the deceased to tell off and warn the appellant not to disturb this Suprel were provocative enough to drive the appellant to lose his self-control. Finally, we also agree with the submission of learned counsel for the appellant that the number of injuries sustained by the deceased does not alter that finding and conclusion as was the case in *Public Prosecutor v Subir Gole*:

The fact that there were 43 injuries found on the deceased did not affect the matter adversely to the respondent. The fact that the respondent had injured himself after the attack revealed that the respondent was deprived of the power of self-control. Any reasonable man placed in the situation and circumstances the respondent was placed would have acted as the respondent did.

On the contrary, the number of injuries sustained by the deceased is further evidence of that loss of self-control. As was the case in *Public Prosecutor v Subir Gole*, we agree that the embarrassment, shame, hurt and all the negative feelings as described by the appellant as well as not expressed by the appellant due to the extent of that embarrassment, was indeed very real. The deceased's siblings were also working at the plantation where a sizable Indonesian community was present. The words uttered by the deceased certainly provoked the appellant and would have provoked in any similarly circumstanced reasonable man into acting as the appellant did within the meaning and intent of Exception 1 to s 300.

CONCLUSION

[60] Consequently, we unanimously find that learned judge had erred in his evaluation of the defence. The defence has raised some doubt to the prosecution's case under s 302 of the Penal Code and at the same time

established his defence on a balance of probabilities. This leaves the conviction of the appellant under s 302 unsafe and unreliable. We therefore, on the ground that grave and sudden provocation has been established, allow the appeal but only to the extent that instead of a conviction under s 302 of the Penal Code, the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under s 304(a) of the Penal Code.

[61] Insofar as sentence is concerned, upon hearing submissions and pleas on mitigation from the learned DPP and learned counsel for the appellant, we find a suitable and appropriate sentence to be a period of 18 years of imprisonment to commence from the date of arrest. It is our considered view that this term of 18 years of imprisonment is proportionate and commensurate with the gravity of the offence in the facts and circumstances of the case and we so order.

Appeal allowed, High Court's decision set aside, appellant convicted on lesser charge of culpable homicide not amounting to murder and sentenced to 18 years' jail in respect of same.

Reported by Ashok Kumar